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SECURITY CLEARANCE CONUNDRUM: THE NEED FOR REFORM AND JUDICIAL REVIEW

Heidi Gilchrist *

A case can be made . . . that secrecy is for losers. For people who don't know how important information really is. The Soviet Union realized this too late. Openness is now a singular, and singularly American, advantage. We put it in peril by poking along in the mode of an age now past. It is time to dismantle government secrecy, this most pervasive of Cold War-era regulations. It is time to begin building the supports for the era of openness that is already upon us.¹

INTRODUCTION

Imagine you arrive at work as a scientist at one of the country's foremost labs after twenty years of service. You are sipping your coffee when security arrives and informs you that your security clearance has been revoked and therefore, you are no longer authorized to work there, or even be in the building. When you ask why you have lost your security clearance, and thus your job, the answer is you are a national security risk and it would even be a threat to national security to tell you why. You try to appeal the decision, but you are told it is final. You think to yourself, I am an American, I have certain indelible rights, so you go to an attorney. You take the agency you work for to court, the court tells you that it is very sorry but no one has a right to a security clearance because matters of national security are committed to the Executive Branch, and the court cannot examine the merits of a securi-

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1. DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 227 (1998).

ty clearance decision. Your scientific research and expertise involve national security and there are no jobs that you are qualified for that would not require a clearance. You think to yourself, now what? This is not fiction, this is the current law of national security clearances.

One need only to look at recent headlines to understand the importance of security clearance decisions and the severe flaws in the system. *The New York Times* headlined in July 2016: "Email Case May Complicate Clinton Aides' Pursuit of Security Clearance."² In order to obtain top diplomatic or national security posts, some of Clinton's aides will need a security clearance.³ For millions of Americans, a security clearance leads to better pay and job opportunities. In facing the terror threat, we need people with language abilities and experience abroad. These people are often unable to get cleared, or if they are, it can take years. At the same time, we are faced with an 'insider threat' where those with clearances are causing harm and even deaths. The system needs to be reformed. However, as important as security clearances are, most people, even those with a security clearance, do not fully understand the security clearance process or the fact that if their clearance is revoked, how little recourse they actually have.

Part I examines the case law of security clearances since the 1988 Supreme Court decision in *Department of Navy v. Egan* that has been interpreted broadly to mean that courts do not have the authority to examine the merits of a security clearance decision. Drawing on examples since 9/11, this article details two cases involving Muslim men who had worked for the United States government for decades when they had their security clearances revoked.⁴ It discusses how they were not fully informed of why their security clearance was revoked, and shows how courts were completely deferential to the agencies' decisions to revoke the clearances.⁵ It then elaborates on areas in the periphery of security clearance decisions where courts have held that they have the ability to review the decisions. Part II discusses the special situa-

2. Eric Lichtblau & Steven Lee Meyers, *Email Case May Complicate Clinton Aides' Pursuit of Security Clearance*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/07/us/state-department-emails-fbi.html>.

3. *See id.*

4. *See El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 177 (3d Cir. 2010); *Makky v. Chertoff*, 541 F.3d 205, 209 (3d Cir. 2008).

5. *El-Ganayni*, 591 F.3d at 181–82; *Makky*, 541 F.3d at 212–13.

tion of whistleblowers in the intelligence community. If individuals in the intelligence community blow the whistle and then their security clearance is revoked, they lose their job. However, courts, under *Egan*, still cannot review the merits of the revocation of their clearance. Therefore, these individuals are left completely without recourse. Part III shows reform is needed because there are serious problems in the security clearance process. Those with critical skills are not getting cleared or take years to get cleared, and persons who should never have a clearance have obtained them, creating an insider threat situation. This article then discusses reforms that are currently being made and that further reforms are still needed. The article concludes by arguing that security clearances are not like wartime battlefield decisions, but are generally discrimination and retaliation claims that Article III judges are wholly competent to make, and should make, to ensure the integrity of the security clearance process and the safety of the country.

I. SECURITY CLEARANCE DECISIONS

A. *No Avenue for Redress*

If an individual's security clearance is denied or revoked, there is no avenue for the individual to contest the denial or revocation on the merits. Although courts have said there is the possibility of review if an agency has not followed its own procedures,⁶ and even the Supreme Court has indicated there may be the possibility of review when the Constitution has been violated,⁷ no case has actually been successful. It is accepted that "no one has a 'right' to a security clearance"⁸ and "genuine and legitimate doubt is to be resolved in favor of national security."⁹ Without review, this leads to the troubling situation where those making security clearance decisions operate knowing no one will ever review the decisions they are making.

The reasoning from the Supreme Court in *Department of the Navy v. Egan*,¹⁰ echoed by other courts, is that courts lack the ex-

6. *Duane v. U.S. Dep't of Def.*, 275 F.3d 988, 993 (10th Cir. 2002).

7. *Webster v. Doe*, 486 U.S. 592, 603–04 (1988).

8. *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

9. *Berry v. Conyers*, 692 F.3d 1223, 1236 (Fed. Cir. 2012).

10. 484 U.S. 518 (1988).

pertise to make the judgment required in a security clearance case and that matters of national security should be left to the Executive Branch.¹¹ The Court reasoned that "[t]he attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best'"¹² and that a "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information."¹³ The Court expanded on its reasoning, giving absolute deference to the agency making the decision:

[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.¹⁴

The Court concluded that the authority given to the agency in deciding security clearance cases is final: "[A]n agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. . . .' As noted above, this must be a judgment call."¹⁵

11. Thomas Egan was denied a security clearance and therefore lost his job at a naval facility. *Id.* at 520. According to the letter of intent to deny a security clearance he received from the Director of the Naval Civilian Personnel Command, the reason was because of criminal convictions for assault, being a felon in possession of a gun, and for his failure to disclose two earlier convictions on his application for federal employment. *Id.* at 521. Also mentioned were his past alcohol problems. *Id.* Egan sought review because he said he had paid his debt to society for his convictions, that he did not list convictions older than seven years because he interpreted the employment form as not requiring that information, and that alcohol had not been a problem for him for three years. *Id.* He also submitted favorable material from supervisors as to his background and character. *Id.* The Director of the Naval Civilian Personnel Command reviewed his submission and determined that it did not "sufficiently explain, mitigate, or refute the reasons on which the proposed denial was based. Accordingly, respondent's security clearance was denied." *Id.* at 522. This is even after the Court stated at the outset of its opinion, "[t]he narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." *Id.* at 520.

12. *Id.* at 529 (quoting *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969)).

13. *Id.* at 529.

14. *Id.*

15. *Id.* (citation omitted) (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

The Court also discussed how matters of foreign affairs more generally should be left to the Executive Branch. “The Court also has recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive.’”¹⁶ “As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”¹⁷ The Court then concluded, “[t]hus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”¹⁸ Therefore, under *Egan*, security clearance decisions are often dismissed for lack of subject matter jurisdiction because security clearance decisions are committed to the “sole discretion of the executive branch.”¹⁹

Louis Fisher has argued that although *Egan* is cited for the broad proposition that the “President has broad and exclusive powers under Article II of the Constitution to control access to national security information, especially classified documents,” in reality, “[n]othing in *Egan* recognizes a plenary or exclusive power on the part of the President over classified information.”²⁰ He also highlights the majority ruling—“unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”—to advocate that “[m]embers of Congress have both the authority and the duty to exercise their own powers under Article I.”²¹ However, Congress has not acted in this area and judges remain extremely deferential to Executive decisions in this area.

After *Egan*, courts have consistently held that they cannot review a case that would have them review the merits of the underlying security clearance decision. Plaintiffs have brought cases under the Administrative Procedure Act, the Privacy Act, Fifth Amendment rights to Due Process and Equal Protection, and Title VII to no avail.²² To avoid *Egan*, plaintiffs have argued that

16. *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)).

17. *Id.* at 529–30 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

18. *Id.* at 530.

19. *See, e.g.*, *Ciralsky v. Cent. Intelligence Agency*, 2010 U.S. Dist. LEXIS 120617, at *8 (E.D. Va. Nov. 15, 2010).

20. Louis Fisher, *Judicial Interpretations of Egan*, LAW LIBRARY OF CONGRESS NO. 2010-003499, at 1, 27 (2009).

21. *Id.* at 10 (quoting *Egan*, 484 U.S. at 530).

22. *See, e.g.*, *Peter B. v. Cent. Intelligence Agency*, 620 F. Supp. 2d 58, 64 (D.D.C.

they are not disputing the merits of the security clearance decision but allege discrimination that led up to it.²³ However, in the words of the D.C. District Court, “[t]he D.C. Circuit has long applied *Egan’s* preclusion principle not only to bar lawsuits that seek to challenge security clearance determinations directly . . . but also to prevent the progression of employment discrimination and retaliation actions that are, at bottom, based on an alleged improper denial or revocation of security clearance.”²⁴ Some courts clearly state they cannot review the case at all.²⁵ However, other courts state they can review some parts of the case, but ultimately conclude they cannot review the case because it would engage the court in second-guessing the Executive Branch.²⁶ Other courts have held that a court may only review, “whether a security clearance was denied, whether the security clearance was a requirement of the appellant’s position, and whether the procedures set forth in [the applicable statute] were followed . . .”²⁷ which essentially leads to the conclusion that they cannot review a security clearance decision.

Courts have even found that those with a revoked security clearance do not have access to the case against them if that information itself is classified:

[b]ecause Mr. Gargiulo had no due process rights with respect to the procedures used to determine whether to suspend or revoke his security clearance, he had no constitutional right to receive the documentary evidence underlying the security clearance suspension before his indefinite suspension from employment took effect. He had due process rights with respect to his indefinite suspension, but they did not include the right to contest the merits of the decision to suspend his security clearance.²⁸

2009).

23. *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008).

24. *Horsey v. U.S. Dep’t of State*, 2006 F. Supp. 3d 256, 268 (D.D.C. 2016) (citations omitted).

25. See, e.g., *Peter B.*, 620 F. Supp. 2d at 78.

26. See, e.g., *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996).

27. *Romero v. Dep’t of Def.*, 527 F.3d 1324, 1328 (Fed. Cir. 2008) (quoting *Hesse v. Dep’t of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000)).

28. E.g., *Gargiulo v. Dep’t of Homeland Sec.*, 727 F.3d 1181, 1185 (Fed. Cir. 2013); see Peter Finn, *U.S. Strips Intelligence Analyst of Security Clearance and Job but Won’t Say Why*, WASH. POST (Nov. 27, 2010, 10:51 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/26/AR2010112605017.html> (discussing the Pentagon’s justification of its decision by relying on a national security clause that states “it would harm the interests of the United States to inform him of the accusations against him”).

Therefore, an individual may have their security clearance revoked, and then be told they do not have access to the information because they no longer have a valid security clearance.

Makky v. Chertoff illustrates the nonsensical position courts are placed in when they review a security clearance revocation without being able to review the merits.²⁹ The court says it can review “[a plaintiff’s] claim of discrimination because a discrimination claim under a mixed-motive theory does not necessarily require consideration of the merits of a security clearance decision.”³⁰ However, the court then “reiterate[s] that in analyzing Makky’s mixed-motive Title VII claim, we cannot question the motivation behind the decision to deny Makky’s security clearance.”³¹ It seems impossible to consider the mixed-motive, without questioning the motivation. The court then says Makky was not minimally qualified for his position without a clearance.³² “A security clearance is the minimum requirement needed to hold Makky’s position. Thus, as of January 2005, when Makky’s clearance was suspended, he was not qualified on the most basic level to perform his job.”³³ However, that was what Makky was contesting. The reasoning is circular, leaving those revoking the clearance the final say without any review.

Makky also sued for violations of procedural due process, claiming he was denied adequate notice of the underlying reason for his suspension.³⁴ He stated that if he had access to the material,³⁵ he could have contested the Transportation Security Administration’s (“TSA”) allegations.³⁶ But the court found, “[b]ecause Makky did not have the requisite security clearance at the time he sought the classified information, TSA could not release that information to him.”³⁷ In situations like *Makky*, a plaintiff is left in an untenable situation where their security clearance has been revoked and the information detailing why their clearance was

29. 541 F.3d 205, 212–13 (3d Cir. 2008).

30. *Id.* at 213.

31. *Id.*

32. *Id.* at 216.

33. *Id.*

34. *Id.*

35. They were released later, well after his suspension. *Id.* at 218.

36. *Id.*

37. *Id.*

revoked is classified. Thus, the plaintiff cannot access the information to contest the revocation decision.

Prior to the lawsuit, Dr. Wagih Makky emigrated to the United States from Egypt, became a naturalized citizen of the United States, and was “a prominent researcher and university professor in the field of aviation security, and is considered to be a technical expert in that field.”³⁸ In fact, after the bombing of a Pan American Airways airplane over Lockerbie, Scotland, the United States government “asked Makky to create a unit within the Federal Aviation Administration . . . for the purpose of developing technology to detect and prevent explosives from being detonated aboard commercial planes and trains.”³⁹

Following general procedures, he submitted his required security clearance renewal application in March 2002.⁴⁰ On March 19, 2003, the day the United States invaded Iraq, he was placed on paid administrative leave and told not to come to work.⁴¹ Makky, on paper, appears to be exactly who the United States government wants working for it. Perhaps there was a real reason behind revoking his security clearance, but would not it have been worth making absolutely sure prejudice and paranoia after September 11, 2001 didn’t play a role?

Another case illustrating the necessity of judicial review is *El-Ganayni v. U.S. Department of Energy*. In *El-Ganayni*, a native-born Egyptian who became an American citizen in 1988 was hired as a physicist at Bettis Laboratory in 1990.⁴² The lab is dedicated to the Naval Nuclear Propulsion Program, “a joint Navy-DOE program responsible for the design, construction, operation, and maintenance of nuclear-powered warships.”⁴³ He worked there for seventeen years and “never received a negative performance evaluation and was never accused of misconduct.”⁴⁴ He received a security clearance in 1990, his clearance was reevaluated five times between 1990 and 2007, and he retained his clearance throughout that time.⁴⁵ El-Ganayni was Muslim.⁴⁶ In 2006, after

38. *Id.* at 207–08.

39. *Id.* at 208.

40. *Id.* at 208–09.

41. *Id.* at 209.

42. *El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 177 (3d Cir. 2010).

43. *Id.*

44. *Id.*

45. *Id.*

the Federal Bureau of Investigation ("FBI") raided a mosque in Pittsburgh during a prayer service, El-Ganayni gave a speech condemning the raid and criticizing American foreign policy, especially the United States' involvement in Iraq.⁴⁷ In June or July 2007, El-Ganayni gave a speech at a mosque promoting prison outreach, but after seeing FBI brochures recruiting Muslim informants, he "told congregants that they should report crimes if they knew of any, but that they should not serve as informants for the FBI until it stopped acting like a political organization."⁴⁸ Finally, El-Ganayni, while serving as an Imam at a prison, distributed a book about Islam titled, *The Miracle in the Ant*, which "contained a passage about a defense mechanism found in certain ants which allows them to burst open their body wall and spray deadly secretions upon attackers."⁴⁹

After being interviewed in October 2007 by the Bettis Laboratory Security Manager about whether he supported killing Americans and whether *The Miracle in the Ant* could be construed to encourage suicide bombings, he was interviewed by the FBI who also asked about whether he was a member of Hamas or al-Qaeda and his views on the Quran.⁵⁰ In December 2007, he received a letter saying he was suspended with pay, but then he was placed on reduced pay.⁵¹ Then, in January 2008 he received a letter saying:

Reliable information in the possession of the Department of Energy indicates that you have knowingly established or continued sympathetic association with a saboteur, spy, terrorist, traitor, seditionist, anarchist, or revolutionist, espionage agent, or representative of a foreign nation whose interests are inimical to the United States, its territories or possessions, or with any person advocating the use of force or violence to overthrow the Government of the United States or any state or subdivision thereof by unconstitutional means.⁵²

In the letter, there was also an explanation about the procedures by which El-Ganayni could challenge these allegations.⁵³ He requested a hearing but, after an initial conference, was informed

46. *Id.*

47. *Id.*

48. *Id.* at 178.

49. *Id.*

50. *Id.*

51. *Id.* at 179.

52. *Id.*

53. *Id.*

that the Department of Energy ("DOE") had terminated the proceedings.⁵⁴ On May 19, 2008, after revoking El-Ganayni's security clearance, Acting Deputy Secretary of Energy Kupfer "certified under Executive Order 12968 that the usual procedures available in security clearance revocation proceedings could not 'be made available . . . without damaging the interests of national security by revealing classified information.'"⁵⁵ Kupfer stated the decision was "conclusive," but did not describe the specific national security concerns behind the decision.⁵⁶ El-Ganayni's security clearance was revoked; he was never told the reasons why and even the procedures generally available in a security clearance revocation case were not available to him.

Once again, the court in *El-Ganayni* was placed in the bizarre situation where it could look at the constitutional claims arising from the revocation process but only to the "extent that we can do so without examining the merits of that decision."⁵⁷ The Third Circuit reversed the district court for dismissing the case for lack of jurisdiction based on *Egan* and *Stehney*, but then said it could not look at the merits of the case because of *Egan*.⁵⁸ In Count I, "El-Ganayni claimed the DOE retaliated against him for constitutionally protected speech by revoking his security clearance."⁵⁹ In order to state a prima facie case of retaliation, a plaintiff must show, "that his conduct was constitutionally protected" and that "his protected activity was a substantial or motivating factor in the alleged retaliatory action."⁶⁰ Although the court admitted that El-Ganayni "could easily establish that the political and religious speech that allegedly led to the revocation of his clearance was constitutionally protected," the court then said it could not look at the second prong without examining the merits of the DOE's decision, so it failed.⁶¹ Therefore, it would seem more straightforward

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 183 (citing *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (holding that although the merits of the revocation decision were non-reviewable, Article III courts have jurisdiction to hear "constitutional claims arising from the clearance revocation process")).

58. *Id.*

59. *Id.* at 184.

60. *Id.* (quoting *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 493 (3d Cir. 2002)).

61. *Id.* ("Proving that El-Ganayni's political speech was 'a substantial or motivating factor' in the decision to revoke his clearance would inevitably require review of the merits of the DOE's decision. There is simply no way to prove or disprove what was—or perhaps more importantly for this case, what was not—a 'substantial or motivating factor' in the

ward to have dismissed it as non-justiciable, because “[w]hatever else happened, the DOE would always prevail because of *Egan*. In short, [the court] believe[d] that *Egan* present[ed] an ‘insuperable bar to relief.’”⁶² In Count II, El-Ganayni alleged “the DOE and Kupfer violated his Fifth Amendment right to equal protection by discriminating against him on the basis of his religion and national origin.”⁶³ Although stating it had the jurisdiction to hear the claim, the court dismissed it under the same reasoning as Count I: “neither El-Ganayni nor a court could compel the DOE to offer a ‘non-discriminatory explanation’ for its decision to revoke El-Ganayni’s clearance. . . . It is beyond judicial review.”⁶⁴

Finally, the court found that the DOE followed the applicable regulations and executive orders meaning there was no violation of the Administrative Procedure Act, even though El-Ganayni was not given a reason for the revocation of his security clearance and thus his job.⁶⁵ And he did not even have the benefit of the procedures generally available in a revocation case. The court cited Executive Order 10865, “Safeguarding Classified Information Within Industry,” and discussed how it provided “minimum procedures required in clearance revocation proceedings.”⁶⁶ However, the court then stated: “[t]he Order also preserves the authority of the head of an agency to bypass any procedure otherwise provided under the Order, if he determines that such procedures ‘cannot be invoked consistently with the national security’” and such determination is “conclusive.”⁶⁷ Similarly, the court discussed Executive Order 12968 and all of its procedural safeguards⁶⁸ but then said that the agency’s head can bypass the procedures in a particular case if it would “damag[e] the national security interests of the United States.”⁶⁹ The court completely deferred to the DOE,

decision to revoke El-Ganayni’s clearance without demanding *some* explanation of that decision from the DOE. It would require discovery of DOE officials and documents concerning the various ‘factors’ that led to the decision to revoke the clearance, and scrutiny of those factors to determine which were ‘substantial’ or ‘motivating.’ We can discern no difference between that inquiry and the review of the merits that is forbidden by *Egan*.” (citations omitted).

62. *Id.* at 185.

63. *Id.* at 180.

64. *Id.* at 186.

65. *Id.* at 186–87.

66. *Id.* at 187 (quoting Exec. Order No. 10865, 3 C.F.R. § 9 (Supp. 1960)); *see also* 10 C.F.R. § 710.1(b) (2016).

67. *El-Ganayni*, 591 F.3d at 187.

68. *Id.* at 188 (citing Exec. Order No. 12968, 3 C.F.R. § 5.2(a)(1)–(7) (1995)).

69. *Id.* (quoting Exec. Order No. 12968, 3 C.F.R. § 5.2(d) (1995)).

saying that it properly revoked El-Ganayni's security clearance, and basically the reasoning is because they said they had to. Once again, perhaps there was an excellent reason for revoking El-Ganayni's security clearance, but it should not be hidden. And it is a farce to say a court is examining the procedures when the only procedure is that they said what they did was in the interests of "national security."

After the lawsuit, El-Ganayni, the respected nuclear physicist, returned to Egypt after residing in the United States for twenty-eight years, saying, "I feel very sad that the American people have lost a good bit of their Constitution. John Adams said that once you lose your rights and liberties, it's very hard to get them back."⁷⁰

Some courts do indeed seem troubled with the extreme deference given to the Executive Branch in this area, but feel powerless to challenge Executive Branch authority in the area of national security after *Egan* and perhaps 9/11. The district court in *El-Ganayni* stated, "[t]he Court recognizes Plaintiff's legitimate concerns with unbridled executive power and is loath to conclude that it does not have jurisdiction to adjudicate a claim that an American citizen's fundamental constitutional rights had been violated."⁷¹ However, it ultimately decided that it did not have jurisdiction.⁷² Another court stated, "Indeed, [the plaintiff] raises legitimate concerns about granting the executive such unilateral authority;" but it still decided that the "granting, denial, or revocation of a security clearance is a *sui generis* act over which the federal courts have no jurisdiction absent congressional directive."⁷³ Some courts have given some leeway to plaintiffs who may not even have access to their case, finding, "[w]here a 'plaintiff does not even know the precise contents of his records because . . . he has no access to them, a plaintiff cannot be expected to plead much detail.'"⁷⁴ But this is not enough protection when someone's livelihood is taken away.

70. Sally Kalson, *Muslim Physicist Leaves U.S. After Losing Security Clearance*, PITT. POST-GAZETTE (Nov. 28, 2008), <http://www.post-gazette.com/neighborhoods/2008/11/28/Muslim-physicist-leaves-U-S-after-losing-security-clearance/stories/200811280> 134.

71. *El-Ganayni v. U.S. Dep't of Energy*, 2008 U.S. Dist. LEXIS 88243, at *11–12 (W.D. Penn. Oct. 31, 2008).

72. *Id.* at *18.

73. *Ciralsky v. Cent. Intelligence Agency*, 2010 U.S. Dist. LEXIS 120617, at *9–10 (E.D. Va. Nov. 15, 2010).

74. *Peter B. v. Cent. Intelligence Agency*, 620 F. Supp. 2d 58, 75 (D.D.C. 2009) (quoting *Doe v. Goss*, 2007 U.S. Dist. LEXIS 2708, at *30 (D.D.C., Jan. 12, 2007)).

We can say err on the side of caution so that we will all sleep better at night. But what has been termed ‘caution’ could also jeopardize national security. We need diversity in our intelligence services. We need to think about problems in unique and different ways—studies have shown that diverse groups make better decisions.⁷⁵ Someone who grew up Muslim, or in Bosnia or Thailand, may be able to think of jihadi terror in a different way. Additionally, people who have travelled abroad or speak foreign languages can give insight into regions that a textbook could never provide. United States intelligence agencies need people who can parse difficult and contrary data and consider multiple perspectives, not only think one mindset is correct. Language and cultural knowledge “makes you more sensitive to nuance, which is what investigations are often all about.”⁷⁶ Further study would need to be done, but it is also worrisome that many of the recent cases in which a security clearance was revoked concerned an ethnic or religious minority.

Judicial review would bring about a necessary inner reflection. Even if courts may mostly agree with security clearance decisions, because there would have to be a high standard of deference given to the Executive Branch, those making clearance decisions will know that their decisions could ultimately go to a trier of fact and will have to, at least minimally, conform their behavior to fit the existing standards.

All of these cases deal with the revocation of a security clearance. When a person is initially denied a security clearance, he or she is in an even more difficult situation as it would be nearly impossible to get past the *Egan* threshold. Therefore, there is no way to know how many people there are who could help our country, especially with critical language skills we need, but are unable to get past the clearance process. John Miller, the Deputy Commissioner for Intelligence and Counterterrorism for the New

75. See Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROC. NAT'L ACAD. SCI. 18524, 18525 (2014); see also Sheen S. Levine & David Stark, *Diversity Makes You Brighter*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html> (“Diversity improves the way people think. By disrupting conformity, racial and ethnic diversity prompts people to scrutinize facts, think more deeply and develop their own opinions. Our findings show that such diversity actually benefits everyone, minorities and majority alike.”).

76. Dan Eggen, *FBI Agents Still Lacking Arabic Skills*, WASH. POST (Oct. 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001388.html> (quoting Professor Daniel Byman).

York Police Department (“NYPD”), stated that fifteen of the nineteen arrests by the FBI that led to charges such as planning to join Islamic State of Iraq and the Levant (“ISIL”) came from an NYPD unit where several dozen multilingual individuals sift through various websites and social media.⁷⁷ Why? He said, “[w]e have an easier time getting Arabic speakers than the FBI, because we don’t have to put them through the security clearances that the [B]ureau does.”⁷⁸

B. Possible Openings

Some courts have indicated that review may be possible for constitutional claims. In fact, the Supreme Court, in the same year that *Egan* was decided, held “[n]othing in [section] 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.”⁷⁹ However, this has been interpreted by some courts to only apply to the Central Intelligence Agency (“CIA”) because it was decided under section 102(c) of the National Security Act, leading to the odd conclusion that only CIA employees are entitled to constitutional review.⁸⁰ Another court “left open the question of whether we can review a security clearance decision even where an individual presents a colorable claim that the agency’s decision violated his or her constitutional rights.”⁸¹ And still other courts find that they can only review constitutional violations in the process of revoking a clearance.⁸² However, no case

77. Steven Brill, *15 Years After 9/11, Is America Any Safer?*, THE ATLANTIC (Sept. 2016), <http://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761>.

78. *Id.*

79. *Webster v. Doe*, 486 U.S. 592, 603–04 (1988).

80. See, e.g., *El-Ganayni v. U.S. Dep’t of Energy*, 2008 U.S. Dist. LEXIS 88243, at *13–14 (W.D. Pa. Oct. 31, 2008) (“However, *Webster* is distinguishable because it was a statutory interpretation case, which construed the delegation of power to the Director of CIA contained in § 102(c) of the National Security Act, 50 U.S.C. § 403(c). By contrast, the authority of the executive branch to revoke security clearances is not derived from a statute, but flows directly from the United States Constitution, Art. II, § 2, ‘and exists quite apart from any explicit congressional grant.’ . . . Thus, the fact that Congress did not empower the CIA Director to evade judicial review of constitutional claims when terminating an employee is not precedential to the issues in this case.” (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988)).

81. *Hegab v. Long*, 716 F.3d 790, 795 (4th Cir. 2013) (emphasis omitted).

82. See, e.g., *El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 183–86 (3d Cir. 2010) (finding that courts only move jurisdiction to hear constitutional claims arising out of the

has successfully challenged the revocation or denial of a security clearance, and only one case has examined the merits of a security clearance decision.⁸³

Even when there is a colorable constitutional claim, courts have found other ways to dismiss the case. Both concurrences in *Hegab v. Long* found that colorable constitutional claims were brought, but found other ways to concur in the dismissal of the case.⁸⁴ Judge Motz's concurrence states: "[i]n light of the holding in *Egan*, at most *Webster* permits judicial review of a security clearance denial only when that denial results from the application of an allegedly unconstitutional *policy*. Since Hegab alleges no unconstitutional policy but only an assertedly unconstitutional individualized adverse determination, his claim fails."⁸⁵ Judge Davis' concurrence states that Hegab's claims raise a non-justiciable political question.⁸⁶ No matter how it is framed, the individual who is denied a security clearance or has their security clearance revoked, even when they claim a constitutional violation has occurred, is left in the same situation—without judicial review of the determination because of the broad deference to the Executive Branch.

Although other courts have stated that constitutional claims or claims regarding the process behind the revocation, can go forward, no court has actually examined the merits of a security clearance decision, except for the Ninth Circuit in *High Tech Gays*.⁸⁷ The Ninth Circuit ultimately found against the plaintiff

clearance revocation process).

83. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 565 (9th Cir. 1990) (subjecting security clearance regulations that impinged upon a fundamental right to strict scrutiny, but ultimately holding that they survived strict scrutiny).

84. *See Hegab*, 716 F.3d at 799 (Davis, J., concurring) ("Reading the material allegations of the complaint in the light most favorable to Hegab, the only thing that changed is he got married to a dual citizen Muslim activist who, before their marriage, robustly exercised her First Amendment rights of speech and association. I do not regard Hegab's allegations as 'conclusory'; rather, I regard them as 'colorable' within the contemplation of our precedents. Unlike the allegations in many extant cases raising claims of unconstitutional security clearance revocations, the gravamen of Hegab's complaint is the alleged denial of equal protection, in violation of the Fifth Amendment.") (footnote omitted); *see id.* at 797 (Motz, J., concurring).

85. *Id.* at 798 (Motz, J., concurring).

86. *Id.* at 799–800 ("[W]hether the agency revoked his security clearance on legitimate national security grounds, or whether the decision 'was based solely on [Hegab's] wife's religion, Islam[,] her constitutionally protected speech[,] and her [mere] association with, and employment by, an Islamic faith-based organization.'").

87. *See High Tech Gays*, 895 F.2d at 565.

because “[h]is membership in a homosexual organization was simply one of the many facets of the criteria being considered as part of [his] homosexual activities. Therefore, the plaintiffs’ claim that consideration of these five criteria is unconstitutional must fail.”⁸⁸

Although some courts state that they can examine constitutional violations in the *process* of revoking a clearance, others have found this to be an impossible task as it would ultimately involve looking at the merits of the case. Many courts cite to *Stehney* for the proposition that courts can review the process of revoking a clearance:

Stehney has not asked for a review of the merits of NSA’s revocation decision. Rather, she asserts NSA violated her constitutional and regulatory rights in revoking her clearance. Therefore, we cannot agree with the district court that the political question doctrine precludes review of her claims. Accordingly, to the extent that Stehney seeks review of whether NSA complied with its own regulations or violated her constitutional rights, we believe she presents a justiciable claim.⁸⁹

However, other courts have indicated that it is impossible to look at the process without examining the merits and therefore decline to review.⁹⁰ But courts should look at process arguments because in many contexts, process can be separated from the merits of the dispute.

Plaintiffs have tried many creative suits to avoid saying they are disputing the *merits* of the security clearance decision, without success. However, some cases have allowed plaintiffs to go forward where the cases have touched on security clearances indirectly. The court in *Zeinali* focused on the fact that in employment discrimination suits against private employers, “courts can generally avoid examining the merits of the government’s security clearance decision.”⁹¹

We hold that we have jurisdiction to adjudicate Zeinali’s discriminatory termination claim, as he does not dispute the merits of the executive branch’s decision to deny his security clearance application.

88. *Id.* at 579.

89. *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996).

90. *See, e.g., Ciralsky v. Cent. Intelligence Agency*, 2010 U.S. Dist. LEXIS 120617, at *10–11 (E.D. Va. Nov. 15, 2010) (“To avoid *Egan*, Ciralsky’s counsel at oral argument stated that the claims arise not from the revocation of his security clearance but from the constitutional violations that led to the revocation. This distinction is illusory.”).

91. *Zeinali v. Raytheon Co.*, 636 F.3d 544, 551 (9th Cir. 2011).

Rather, he disputes the *bona fides* of Raytheon's professed security clearance requirement, and he introduces evidence showing that Raytheon retained similarly situated non-Iranian engineers who lacked security clearances. We reverse the district court and hold that Zeinali's discrimination claim may proceed.⁹²

At least in the Ninth Circuit, the court did not unnecessarily expand the doctrine to include all cases touching upon security clearances indirectly.

The D.C. Circuit also decided not to expand the doctrine as urged by the government to include security referrals.⁹³ However, this is a narrow opening as it only applies to cases where the referral was made using information known to be false.⁹⁴ In 2001, Rattigan, an employee of the FBI, pursued a discrimination claim against his supervisors with the Equal Employment Opportunity Commission ("EEOC").⁹⁵ He then alleged that FBI officials retaliated against him in violation of Title VII of the Civil Rights Act of 1964, when they reported "unfounded security concerns to the Bureau's Security Division" prompting "an investigation into his continued eligibility for a security clearance."⁹⁶ The Security Division did not revoke his clearance, but rather deemed the security concerns of his superiors to be unfounded.⁹⁷ The court gave a new, narrow opening for security clearance cases to go forward, holding that "Rattigan's Title VII claim may proceed only if he can show that agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false."⁹⁸ The court based its decision on an executive order, even though there is a conflicting federal statute.⁹⁹

92. *Id.* at 546.

93. *Rattigan v. Holder*, 689 F.3d 764, 768, 770 (D.C. Cir. 2012).

94. *Id.* at 770; see Demetri Blaisdell, Note, *Title VII Challenges to Security Clearance Referrals: Rattigan Points the Way*, 4 COLUM. J. RACE & L. 177, 201 (2014).

95. *Rattigan*, 689 F.3d at 765.

96. *Id.*

97. *Id.*

98. *Id.* at 771; see *Burns-Ramirez v. Napolitano*, 962 F. Supp. 2d 253, 257–58 (D.D.C. 2013) ("*Rattigan I* and *II* are clear that security personnel decisions regarding whether to investigate, suspend, or revoke a clearance are protected from review, but the actions of other employees who knowingly and falsely refer a matter for investigation due to discrimination or retaliation are not protected from review.>").

99. Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2065–66 (2015) ("In other words, in *Rattigan*, the court placed an executive order that was issued in the 'zone of twilight,' and pursuant to concurrently shared authority, on equal footing with a conflicting statute—and then tried to harmonize the two. It did so without inquiry into whether Congress, in passing Title VII, intended to preclude 'zone of twilight' executive

Courts are using the narrow opening from *Rattigan* to allow cases to go forward that would have been dismissed at the outset under *Egan*. Looking at the carve-out from *Rattigan*, the District of D.C. allowed a plaintiff to replead his motion “if the alleged *basis* for the wrongful revocation of [the plaintiff’s] security clearance was a knowingly false and discriminatory report or referral.”¹⁰⁰ Even though the plaintiff had not mentioned *Rattigan*, the court stated, “it appears that a viable claim of [a *Rattigan*] nature might be lurking within this case.”¹⁰¹ Whether courts will further expand this opening will be closely watched.

Courts have also found that they can review cases where individuals were terminated due to unsuitability and there was no indication that national security was implicated. “[T]he court denies defendant’s motion to dismiss and finds that there is subject matter jurisdiction over plaintiff’s claims regarding his termination from Customs and Border Patrol because there is no evidence in the record that CBP terminated plaintiff on the basis of a national security determination.”¹⁰² Similarly, the court in *Jones v. Ashcroft* held that it had subject matter jurisdiction to review a plaintiff’s Title VII claim challenging the FBI’s rescission of the plaintiff’s employment offer after the FBI determined from a background investigation that the plaintiff was unsuitable for the position because the suitability determination was not “made *in the interest of national security*.”¹⁰³ The court pointed out that there was “no evidence before th[e] Court to indicate that the government, at any time prior to the commencement of th[e] lawsuit, considered national security as a basis for its decision not to hire the plaintiff.”¹⁰⁴

In *Toy v. Holder*, the Fifth Circuit declined to extend *Egan* beyond security clearances, finding that the denial of access to a building is different from security clearance cases, but then held it must defer to the Executive Branch because building access is a matter of national security.¹⁰⁵ “[S]ecurity-clearance decisions are

orders of this nature. This case thereby illustrates one means through which courts interpret executive orders to deprive Congress—and its statutes—of their due power.”).

100. *Horsey v. U.S. Dep’t of State*, 170 F. Supp. 3d 256, 270 (D.D.C. 2016).

101. *Id.*

102. *Corbett v. Napolitano*, 897 F. Supp. 2d 96, 119 (E.D.N.Y. 2012).

103. *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 8–9 (D.D.C. 2004).

104. *Id.* at 8.

105. *Toy v. Holder*, 714 F.3d 881, 884–85 (5th Cir. 2013).

made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions.”¹⁰⁶ The court then contrasted this with building access: “[b]uilding access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions.”¹⁰⁷ The court concluded that “[a] lack of oversight, process, and considered decision-making separates this case from *Egan*, which therefore does not bar Toy’s suit.”¹⁰⁸ However, the court went on to find that Toy’s suit was barred because Executive Order 12968 applied to Toy as a contract employee, and under that order “the agency has the ability to grant or deny access to facilities within its discretion based on considerations of national security.”¹⁰⁹ Therefore, once again, absolute deferral to the Executive Branch because of national security is found.

The vast majority of cases dealing in any way with a security clearance revocation are dismissed at the outset. The government also argues for expansion of *Egan* into every area touching on security clearances.¹¹⁰ In fact, in 2013, the Federal Circuit expanded *Egan*’s broad reach to “noncritical sensitive” positions, adding hundreds of thousands of federal employees that will not have access to appeal the merits of adverse actions.¹¹¹ In justifying its broad holding the court stated, “[i]t is naive to suppose that employees without direct access to already classified information cannot affect national security. The Board and Northover’s narrow focus on access to classified information ignores the impact employees without security clearances, but in sensitive positions, can have.”¹¹² Therefore, employees who do not have access to classified information can have their jobs taken away without judicial review of that decision. As the dissent pointed out, the very rea-

106. *Id.* at 885.

107. *Id.*

108. *Id.* at 885–86.

109. *Id.* at 887.

110. See, e.g., *Rattigan v. Holder*, 689 F.3d 764, 767 (D.C. Cir. 2012) (“On rehearing, the government argues that decisions to report security concerns come within *Egan*’s scope because they ‘involve precisely the same type of predictions about risks to national security’ as the decision to grant or deny clearance . . .”) (quoting Brief for Appellant on Panel Rehearing at 6, *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (No. 10-5014)).

111. *Kaplan v. Conyers*, 733 F.3d 1148, 1159–60 (Fed. Cir. 2013); see Alexandra Cummings, Comment, *Kaplan v. Conyers: Preventing the Grocery Store Clerk From Disclosing National Security Secrets*, 119 PA. ST. L. REV. 553, 554, 556 (2014) (arguing that the expansion of *Egan* to personnel with sensitive positions “disrupts congressional intent, precedent, and the rights of millions of federal employees”).

112. *Kaplan*, 733 F.3d at 1163.

son Congress gave civil service employees Merit Systems Protection Board¹¹³ ("MSPB") review was so they would "be 'protected against arbitrary action, personal favoritism, and . . . partisan political coercion' that may occur within government agencies."¹¹⁴ They just lost that protection.

Courts should look to *Webster* and review security clearance decisions where there are constitutional claims. There is no reason for absolute deference to the Executive Branch in this area, and courts should review for both violations of the Constitution in the process of revoking or denying a security clearance, and the actual merits of the decision.

II. WHISTLEBLOWERS

We need whistleblowers, but if further protections are not put in place, federal employees working in intelligence with security clearances will not blow the whistle as they have little or no protection for continued employment after they have done so if the agency employing them revokes their security clearance.¹¹⁵ Courts have held that under *Egan*, they cannot review a security clearance decision even when the employee is alleging that their security clearance has been revoked in retaliation for whistleblowing.¹¹⁶ Similarly, the Tenth Circuit held that "whistleblower protection laws passed by Congress do not alter the constitutional order, recognized in *Egan*, that gives the Executive Branch the responsibility to make national security determinations."¹¹⁷ With-

113. See *About MSPB*, U.S. MERIT SYS. PROT. BD. <http://www.mspb.gov/About/about.htm> (last visited Apr. 5, 2017) ("The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems . . . The mission of the MSPB is to promote an effective Federal workforce free of Prohibited Personnel Practices.").

114. *Kaplan*, 733 F.3d at 1173 (Dyk, J., dissenting) (quoting S. REP. NO. 95-969, at 19 (1978), as reprinted in 1978 U.S.C.C.A.N. 2723, 2741).

115. See RODNEY M. PERRY, CONG. RESEARCH SERV., R43765, INTELLIGENCE WHISTLEBLOWER PROTECTIONS: IN BRIEF 1 (2014) ("Generally speaking, whistleblowers are those who expose misconduct (e.g., fraud, abuse, or illegal activity) within an organization. In the context of the Intelligence Community (IC), whistleblowers are generally employees or contractors of federal intelligence agencies who bring to light information on agency wrongdoings. Whistleblowers disclose this information through government channels (e.g., the congressional intelligence committees or agency inspectors general) or to the media. Such disclosures can aid oversight of, and thereby curb misconduct within, intelligence agencies.").

116. See, e.g., *Hesse v. Dep't of State*, 217 F.3d 1372, 1377–80 (Fed. Cir. 2000), cert. denied, 531 U.S. 1154 (2001).

117. *Teufel v. Dep't of the Army*, 608 F. App'x 705, 707 (10th Cir. 2015) (quoting *Hall v.*

out judicial review, once a security clearance is revoked, the whistleblower is left without a job or any protection.¹¹⁸

The protections for whistleblowers in the intelligence community are extremely limited. The Whistleblower Protection Act offers broad protection to federal employees¹¹⁹ but specifically excludes members of the intelligence community.¹²⁰ Therefore, Congress passed the Intelligence Community Whistleblower Protection Act of 1998 ("ICWPA").¹²¹ However, the ICWPA only outlines procedures by which whistleblowers can report to Congress a matter of "urgent concern"¹²² and only after first bringing the complaint or information to the agency head through proper agency channels.¹²³ The ICWPA also specifically states that actions taken pursuant to it are not subject to judicial review.¹²⁴

U.S. Dep't of Labor, 476 F.3d 847, 852 (10th Cir. 2007)).

118. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 493–94 (2014) ("Another common criticism of the current whistleblower protection statutes is that they do not protect covered employees from security clearance-related retaliation Allowing agencies to alter an employee's security clearance provides agencies with a back door way to effectively fire or blacklist employees who blow the whistle.").

119. The Whistleblower Protection Act includes:

(A) [a]ny disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

See 5 U.S.C. § 2302(b)(8)(A)–(B) (2012).

120. See *id.* § 2302(a)(2)(C)(ii)(I).

121. Pub. L. No. 105-272, 112 Stat. 2396. The ICWPA was codified in 50 U.S.C. § 3517(d)(5) for the CIA, and for all other intelligence organizations under 5 U.S.C. app. § 8H.

122. "Urgent concern" means any of the following:

(I) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

(II) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.

(III) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) of this section in response to an employee's reporting an urgent concern in accordance with this paragraph.

50 U.S.C. § 3517(d)(5)(G)(i) (2012).

123. 50 U.S.C. § 3517(d)(5)(A) (Supp. II 2015).

124. *Id.* § 3517(d)(5)(F) (Supp. II 2015).

Therefore, "absent any enforcement mechanism, the ICWPA arguably fails to provide any real protection to national security whistleblowers."¹²⁵ President Obama implemented Presidential Policy Directive 19 ("PPD-19") on October 10, 2012 to protect whistleblowers with access to classified information.¹²⁶ However, it also lacks an enforcement mechanism, and requires employees to first go to their supervisors.¹²⁷ If employees are complaining about abuses within their own agency, their supervisors will not give them the protection they need. Therefore, PPD-19 and ICWPA ultimately will not safeguard members of the intelligence community who blow the whistle and then have their security clearance revoked.

The greatest step forward to date in protecting whistleblowers is Title VI of the Intelligence Authorization Act, but judicial review is still needed to properly protect whistleblowers. Title VI prohibits an adverse personnel action as a

reprisal for a lawful disclosure of information . . . to the Director of National Intelligence[,] . . . the appropriate inspector general of the employing agency, a congressional intelligence committee, or a member [there] . . . of which the employee reasonably believes evidences—(1) a violation of any Federal law, rule, or regulation; or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.¹²⁸

However, Title VI expressly leaves enforcement to the President.¹²⁹ Therefore, for those who have lost a security clearance, and therefore their job, they will still not be able to contest the revocation on the merits in court.

There are many examples of whistleblowers who have claimed they were retaliated against by losing their clearances, but since there is no external review process, it is impossible to know whether their allegations are true or not.

When Ilana Greenstein blew the whistle on mismanagement at the CIA, she tried to follow all the proper procedures. First, she told her

125. Papandrea, *supra* note 118, at 493.

126. EXEC. OFFICE OF THE PRESIDENT, PRESIDENTIAL POLICY DIRECTIVE/PPD-19: PROTECTING WHISTLEBLOWERS WITH ACCESS TO CLASSIFIED INFORMATION 1 (2012), <https://fas.org/irp/offdocs/ppd-19.pdf> [hereinafter PPD-19].

127. *See id.* at 4. The External Review Panel can only make recommendations to the agency head as to corrective actions that should be taken for the employee who has been the subject of retaliation.

128. 50 U.S.C. § 3234(b) (Supp. II 2015).

129. *Id.* § 3234(c).

supervisors that she believed the agency had bungled its spying operations in Baghdad. Then, she wrote a letter to the director of the agency. But the reaction from the intelligence agency she trusted was to suspend her clearance and order her to turn over her personal computers. The CIA then tried to get the Justice Department to open a criminal investigation of her.¹³⁰

Greenstein is now employed as Of Counsel at a national security law firm in Washington, D.C.¹³¹ Wouldn't it have been nice to at least explore her allegations?

The case of whistleblower Franz Gayl shows the importance of protection for whistleblowers and how review by an outside board can make a difference. Gayl was a senior science advisor for the Marine Corps who advocated for Mine Resistant Ambush Protected vehicles ("MRAPs") during the Iraq war.¹³² When his requests were ignored at the Pentagon, he spoke out publicly, going to Congress and the media.¹³³ He "described the military's delay in making a priority of the acquisition of the vehicles as 'criminal negligence,' given their proven ability to protect troops against improvised explosive devices."¹³⁴ He was then suspended and lost his security clearance for alleged improper use of a flash drive on a secure computer.¹³⁵ "Former defense secretary Robert M. Gates later cited media reports about the effectiveness of the vehicles, largely based on Gayl's advocacy, in explaining his decision" to make procurement a top priority.¹³⁶ The MSPB found "there are reasonable grounds on which to believe that Mr. Gayl's indefinite suspension is a result of his protected activity and is therefore prohibited. . . ."¹³⁷ He was reinstated and able to return to work.¹³⁸ Because he worked for the military, Gayl at least had recourse to

130. Marisa Taylor, *Intelligence, Defense Whistleblowers Remain Mired in Broken System*, MCCLATCHY (Dec. 30, 2014), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777871.html>.

131. Ilana S. Greenstein, Esq., LAW OFFICE OF MARK S. ZAID, P.C., <http://www.markzaid.com/biography.php?id=6> (last visited Apr. 5, 2017).

132. Jason Ukman, *Whistleblower Franz Gayl Gets His Job Back*, WASH. POST (Nov. 17, 2011), https://www.washingtonpost.com/blogs/checkpoint-washington/post/a-whistleblower-gets-his-security-clearance-back/2011/11/17/gIQAWuJPUN_blog.html?utm_term=.746E93666923.

133. See *id.*

134. *Id.*

135. R. Jeffrey Smith, *Pentagon Whistleblower Franz Gayl is Reinstated*, CTR. PUB. INTEGRITY (Nov. 16, 2011), <http://www.publicintegrity.org/2011/11/16/7417/pentagon-whistle-blower-franz-gayl-reinstated>.

136. Ukman, *supra* note 132.

137. Gayl v. Dep't of the Navy, No. CB-1208-12-0001-U-1 (M.S.P.B. Oct. 13, 2011).

138. Ukman, *supra* note 132.

the MSPB, which most in the intelligence community do not. Although advocating for judicial review, any independent review body would at least offer moderating influence.¹³⁹

III. REFORM

A. Recent Failures

Although courts have consistently held that they lack the necessary expertise to decide security clearance cases, the current system of clearances is under fire for severe inadequacies. Recent events have called into question the process by which security clearances are obtained and show that reform is needed. Aaron Alexis murdered twelve of his colleagues and gained access to the United States Navy office while having a security clearance.¹⁴⁰

In his security clearance application, Alexis said he lived in Seattle but worked in Manhattan. No one asked about that. Alexis told the investigator that a felony arrest on his record was for letting air out of someone's tires. He didn't mention that he let the air out with a .45 caliber Glock handgun. That detail was in a Seattle police report that also said Alexis had a "blackout fueled by anger." But there's no record any investigator pursued that police report.¹⁴¹

Similarly, there were many red flags raised about Bradley Manning, who disclosed classified documents to WikiLeaks, none of which were followed up with.¹⁴² There was a 911 call from his stepmother: "[m]y husband's 18-year-old son is out of control and just threatened me with a knife."¹⁴³ He, himself, even wrote that he joined the military to "sort out the turmoil and mess in my life."¹⁴⁴ Manning's supervisor went to her supervisor because of various incidents, including pointing to the patch of the American

139. Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 367 (2014) ("A lack of any meaningful independent review further increases the likelihood of error or abuse. The mere fact, or likelihood, of independent review serves as a moderating influence, providing a strong incentive for the decision makers to act in a way they can justify to a court or analogous review board. Independent oversight also serves an important educative function, helping to ensure that officials learn about and take steps to correct errors. In its absence, ineffective or unnecessary restraints are much more likely to persist.").

140. Scott Pelley, *Into Dangerous Hands*, CBS NEWS (Nov. 8, 2015), <http://www.cbsnews.com/news/into-dangerous-hands-60-minutes/>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

flag and asking Manning what it meant and he said, “[i]t means absolutely nothing to me. I hold no allegiance to this country and the people in it.”¹⁴⁵

Although he did not have a security clearance, Omar Mateen, who killed forty-nine people in an Orlando nightclub, one of the worst mass murders in American history, worked for one of the world’s premier private security companies, G4S.¹⁴⁶ G4S obtained a \$234 million contract from the Department of Homeland Security and had past contracts with the State Department, Justice Department, Energy Department, Drug Enforcement Administration, Army, and Air Force.¹⁴⁷

Deciding who is a security threat is fraught with difficulties. In deciding who is trustworthy, are we really deciding who is like us? If someone is different, do they then appear less trustworthy? “There are no actuarial models or empirically tested criteria for identifying who might in fact pose a security threat.”¹⁴⁸ Do the contractors doing the background checks have the necessary expertise to understand someone’s background who may be different, but be someone who can fill a critical need for the country? We need people with language abilities who may have traveled extensively abroad and are risk-takers. These individuals may not easily pass a security clearance.

Although courts defer to the Executive Branch because of a perceived expertise, and we therefore cannot know what has happened in the security clearance area because it is, indeed, classified, an example from the immigration setting is illuminating. The Board of Immigration Appeals (“BIA”) denied two aliens withholding of removal, finding they were a danger to the security of the United States.¹⁴⁹ However, in examining the evidence

145. *Id.*

146. Alan Blinder et al., *Omar Mateen: From Early Promise to F.B.I. Surveillance*, N.Y. TIMES (June 12, 2016), https://www.nytimes.com/2016/06/13/us/omar-mateen-early-signs-of-promise-then-abuse-and-suspected-terrorist-ties.html?_r=1; Michael Daly et al., *Omar Mateen, Terrorist Who Attacked Orlando Gay Club, Had Been Investigated by FBI*, DAILY BEAST (June 12, 2016), <http://www.thedailybeast.com/articles/2016/06/12/omar-mateen-id-d-as-orlando-killer.html>.

147. Bridget Johnson, *Senator to DHS: How Did Omar Mateen Pass Employment Check with Federal Contractor?*, PJ MEDIA (June 29, 2016), <https://pjmedia.com/homeland-security/2016/06/29/senator-to-dhs-how-did-omar-mateen-pass-employment-check-with-federal-contractor/>.

148. Daskal, *supra* note 139, at 366.

149. *Yusupov v. Att’y Gen. of U.S.*, 650 F.3d 968, 972 (3d Cir. 2011).

against them, the Third Circuit found many deficiencies, including the fact that evidence of a terror link from computer materials was, in reality, merely videos from Al Jazeera.¹⁵⁰ “Moreover, contrary to the BIA’s finding, several of the videos, including that of bin Laden, originated from Al Jazeera, a recognized news source.”¹⁵¹ This is indeed frightening for anyone who is even studying Arabic and may use Al Jazeera or other Arabic language sites as learning material. The Third Circuit summed up their position:

We are acutely cognizant that, in most respects, Congress has delegated issues of national security with respect to aliens to the agencies that deal with immigration, most particularly to the Board of Immigration Appeals. We recognize that the BIA is in a position of knowledge superior to that of the federal courts. Nonetheless, we retain our historic, indeed constitutional authority, to review executive agencies’ determinations, giving their determinations due deference.¹⁵²

We need a similar deference to the Executive Branch in the security clearance decision process, but there needs to be review so that people who have watched Al Jazeera are not denied a security clearance because they are honing the language skills we need so badly.

B. *Current Reforms*

We need to examine the level of material that is classified,¹⁵³ and who really needs a security clearance and at what level.¹⁵⁴ As

150. *Id.* at 985.

151. *Id.*

152. *Id.* at 992.

153. See generally DANIEL PATRICK MOYNIHAN, *SECURITY: THE AMERICAN EXPERIENCE* 206 (1998) (“There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past. This is the lesson of the Pentagon Papers experience”) (quoting Erwin Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25). See generally Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399 (2009) (discussing how to reform the classification system to reduce over-classifying information).

154. See generally Max Fisher, *Top Secret Clearance Holders So Numerous They Include Packers/Craters*, WASH. POST (June 12, 2013), <https://www.washingtonpost.com/news/worldviews/wp/2013/06/12/top-secret-clearance-holders-so-numerous-they-include-packers-craters/> (discussing the questionable extent to which security clearances have been granted to employees in the United States Intelligence Community); Brian Fung, *5.1 Million Americans Have Security Clearances. That’s More Than the Entire Population of Nor-*

of 2014, an estimated 4,514,576 Americans held or were approved to hold a clearance.¹⁵⁵ If there are fewer clearances, we can devote more resources to making sure those with security clearances are properly cleared. In the words of Donald Rumsfeld, former Secretary of Defense, “I have long believed that too much material is classified across the federal government as a general rule. . . .”¹⁵⁶ Still relevant today is the recommendation of Daniel Patrick Moynihan’s 1997 Commission on Protecting and Reducing Government Secrecy that, “[t]he best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall.”¹⁵⁷ In fact, there is so much secrecy and classifications that scholars have advocated for leaks as a way of informing the public on unnecessarily classified issues.¹⁵⁸

There is not even a uniform definition of Secret/Top Secret or what jobs need what clearance.¹⁵⁹ Although 95 percent of security clearances are done by the Office of Personnel Management (“OPM”), the other 5 percent are done by twenty-one different agencies, mostly within the intelligence community, all with their own procedures.¹⁶⁰ This leads to a situation where someone could

way, WASH. POST (Mar. 24, 2014), <http://www.washingtonpost.com/news/the-switch/wp/2014/03/24/5-1-million-americans-have-security-clearances-that-s-more-than-the-entire-population-of-norway/> (discussing the ballooning number of Americans with security clearances).

155. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, 2014 REPORT ON SECURITY CLEARANCE DETERMINATIONS (2015), <https://www.dni.gov/files/documents/2015-4-21%20Annual%20Report%20on%20Security%20Clearance%20Determinations.pdf>.

156. Donald H. Rumsfeld, *War of the Words*, WALL ST. J., July 18, 2005, at A12.

157. REP. OF THE COMM’N ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at XXI (1st Sess. 1997), <https://www.gpo.gov/fdsys/pkg/GPO-CDOC-105sdoc2/content-detail.html>.

158. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 575 (2013) (“The bloated official secrecy system sends an opposite signal: that the government has something to hide. When the American people learn the executive branch classified more than ninety-five million items last fiscal year, without learning anything about the content of those items, the effect is not likely to inspire trust. Concealment on such a scale inspires, instead, the belief that national security policy is a realm of nonaccountability. Leaks are holes in the wall that encircles this realm, rays of sunlight from a shadow world . . .”).

159. See John V. Berry, *The Department of Energy Security Clearance Process*, SECURITY CLEARANCE L. BLOG (July 7, 2015), <http://www.securityclearanceblog.com/page/2/> (“Most federal agencies use similar language when discussing clearance levels. The most common terminology used to describe clearance levels is Confidential, Secret and Top Secret. At the DoE this is different. At DoE there are two types of security clearances, the L and the Q clearances. The L clearance is similar to a Confidential and Secret clearance and the E clearance is equivalent to a Top Secret (TS) security clearance.”).

160. See OFFICE MGMT. & BUDGET, SUITABILITY AND SECURITY PROCESSES REVIEW 2

be denied a top secret security clearance by one agency, but still acquire a top secret clearance from another agency. There is mistrust between agencies as they think their procedures are better, or they simply do not trust the procedures of another agency.¹⁶¹ There is a plan to develop a new agency, the National Background Investigations Bureau ("NBIB"), within the OPM, to conduct security checks, but it still leaves most of the intelligence agencies able to separately handle their own security clearances.¹⁶²

A recent hack of the OPM system highlights these inadequacies.

The hackers' access was so extensive that U.S. officials said they think it is "highly likely" that every file associated with an OPM-managed security clearance application since 2000 was exposed [a total of 22.1 million people]. . . . The CIA, largely appears to have been shielded from damage, especially for employees who have never worked at any other agency, officials said.¹⁶³

Some reforms in response to recent events are being made. After strong criticisms following the Snowden case, where his on-line record would have yielded information about his anti-government stance, new legislation was passed in December 2015, allowing background investigators to examine applicants' social media accounts.¹⁶⁴ Congressman Jason Chaffetz said "we

(2014); Katherine L. Herbig & Peter R. Nelson, *Reciprocity: A Progress Report*, PERSEREC, Tech. Rep. 04-2, at xi (2004).

161. See Herbig & Nelson, *supra* note 160, at 33.

162. See Exec. Order No. 13467, Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information, 73 Fed. Reg. 38,103 (July 2, 2008); Jamal Brown, *Modernizing & Strengthening the Security & Effectiveness of Federal Background Investigations*, WHITEHOUSE.GOV (Jan. 22, 2016, 11:00 AM), <https://www.whitehouse.gov/blog/2016/01/22/modernizing-strengthening-security-effectiveness-federal-background-investigations>.

163. Ellen Nakashima, *Hacks of OPM Databases Compromised 22.1 Million People, Federal Authorities Say*, WASH. POST (July 9, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/>.

164. See 5 U.S.C. § 11001 (Supp. III 2012) (instructing the Director of National Intelligence to create policies for checking social media in security checks); see also Andrew Katz, *Potential Blind Spots in Clearance Process that Gave Snowden Top-Secret Access*, TIME (June 15, 2013), <http://nation.time.com/2013/06/15/potential-blind-spots-in-clearance-process-that-gave-snowden-top-secret-access/> ("Just days after Snowden's unveiling, snippets from more than a decade of his online history were uncovered that could have been cause for investigators' concern: He was a prolific commenter on government and security issues, rallied against civil surveillance and contributed to Ron Paul's campaign at least twice last year. Ironically, the government might be able to prevent leaks like the one that revealed a widespread Internet surveillance program if they do a little more online detective

give top security clearance . . . and we can't go online and look at their social media . . . Go hire a bunch of teenagers. They'd do it better than we're doing it."¹⁶⁵ The federal government will now begin looking at applicants' social media posts as part of the security clearance process because information on Facebook, Twitter, and similar sites is increasingly viewed as an important and relevant part of someone's background.¹⁶⁶ Also included is a plan to look continuously at employees, not just at set intervals.¹⁶⁷

A candidate's first contact with the agency he or she is going to work for is the security clearance process. The lack of transparency in the security clearance process and undue delay can cause grave misgivings in the people who we want to work for the government. In an effort to solve the problem of candidates waiting years to be cleared, the Intelligence Authorization Act for Fiscal Year 2010 required the President to submit an annual report to Congress on the security clearance process, "to include the total number of security clearances across government and in-depth metrics on the timeliness of security clearance determination in the Intelligence Community."¹⁶⁸ At the CIA, there are seventy-eight people who have been waiting over a year for their clearance, and at NSA, 115 people have been waiting for over a year.¹⁶⁹ Interestingly, the report does not detail how long over a year these candidates have been waiting.¹⁷⁰ Every year, the report states, "The IC [Intelligence Community] continues to face timeliness challenges in clearing individuals with unique or critical skills—such as highly desirable language abilities—who often have significant foreign associations that may take additional time to in-

work.").

165. Joe Davidson, *Is Obama Administration's New Security Clearance Plan Just 'Happy Talk'?*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/02/25/officials-get-skeptical-questions-on-security-clearance-plan>.

166. Damian Paletta, *Social Media Posts Now Fair Game in Security Clearance Process*, WALL ST. J. (May 13, 2016, 3:24 PM), <http://www.wsj.com/articles/social-media-posts-now-fair-game-in-security-clearance-process-1463167475>.

167. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, SECURITY EXECUTIVE AGENT DIRECTIVE 5: COLLECTION, USE, AND RETENTION OF PUBLICLY AVAILABLE SOCIAL MEDIA INFORMATION IN PERSONNEL SECURITY BACKGROUND INVESTIGATIONS AND ADJUDICATIONS 1, 3 (1992).

168. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2011 REPORT ON SECURITY CLEARANCE DETERMINATIONS 2 (2011).

169. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2015 REPORT ON SECURITY CLEARANCE DETERMINATIONS 11 (2015).

170. *See id.*

investigate and adjudicate.”¹⁷¹ We need to prioritize intelligence agency candidates, with critical skills, or at least not clear the easy candidates and leave those with critical language abilities and expertise languishing for years because they are a bit more complicated.¹⁷² Waiting for years for a security clearance may encourage those with the skills the government needs to begin other careers, and a security clearance denial with no avenue to contest leaves the country without the critical skills the government needs, especially in the counterterrorism arena.¹⁷³

One of the most unpleasant parts of the security clearance process is the polygraph exam and its efficacy is seriously in doubt. Courts rarely find polygraphs admissible at trial because “polygraph evidence has long been considered of dubious scientific value and hence has been deemed irrelevant by the federal courts.”¹⁷⁴ However, they are strangely a seemingly critical component of the security clearance process within the intelligence agencies.¹⁷⁵ The National Research Council declared the polygraph too inaccurate and called on the federal government to stop using them as part of the clearance process saying,

tests that are sensitive enough to spot most violators will also mistakenly mark large numbers of innocent test takers as guilty. Tests that produce few of these types of errors, such as those currently used by several federal agencies, will not catch most major security violators—and still will incorrectly flag truthful people as deceptive.¹⁷⁶

171. *Id.* at 13.

172. See Eggen, *supra* note 76 (Professor Byman states that “[w]ith any new immigrant communities [sic], they need these language skills, whether it’s Vietnamese or Pakistani or Arabic It also often gives you extra cultural knowledge and sensitivity. It makes you more sensitive to nuance, which is what investigations are often all about It is easier to get a security clearance if you don’t have any interaction with foreigners, which is not what you want if you want better interaction with foreigners.”).

173. See Rowan Scarborough, *Lack of Translators Hurts War on Terror*, WASH. TIMES (Aug. 31, 2009), <http://www.washingtontimes.com/news/2009/aug/31/lack-of-translators-still-hampers-intelligence/> (“The necessary cadre of U.S. intelligence personnel capable of reading and speaking targeted regional languages such as Pashto, Dari and Urdu ‘remains essentially nonexistent,’ the Senate Select Committee on Intelligence wrote in a rare but stark warning in its 2010 budget report. The gap has become critical in the war effort, especially in the Afghanistan-Pakistan theater, where al Qaeda and Taliban operatives text message, e-mail and talk in languages that the intelligence community had largely ignored before 2001.”).

174. See, e.g., *United States v. Rodríguez-Berríos*, 573 F.3d 55, 73 (1st Cir. 2009) (quoting *Devries v. St. Paul Fire & Marine Ins. Co.*, 716 F.2d 939, 945 (1st Cir.1983)).

175. See *Application Process*, U.S. INTELLIGENCE COMMUNITY: INTELLIGENCE CAREERS, <https://www.intelligencecareers.gov/icapply.html> (last visited Apr. 5, 2017).

176. Press Release, National Academy of Sciences, *Polygraph Testing Too Flawed for*

In essence, nervous people may fail the polygraph even though they have nothing to hide, and people who are pathological liars who can calmly lie will pass. Or, people can be taught to pass.¹⁷⁷ Aldrich Ames passed two polygraph exams at the CIA while spying for Russia, and when asked how he did it, answered, “[w]ell, [polygraphs] don’t work.”¹⁷⁸ Once again, when someone fails a polygraph and then gets their security clearance denied or revoked, they have no recourse.

The MSPB has semi-judicial procedures that provide some protection for federal employees, and the Defense Office of Hearings and Appeals publishes its security clearance decisions for contractors online,¹⁷⁹ but the security clearance decisions of the intelligence community operate completely internally. Although advocating for judicial review, there should at the very least be a formal review board for the intelligence agencies, instead of the current shadowy, internal structure at agencies like the CIA¹⁸⁰ and NSA.

IV. NOT A BATTLEFIELD DECISION, LEGAL ISSUES

Legal issues such as whether there has been discrimination in deciding a security clearance are very different from deciding whether there should be a drone strike or a counterterrorism operation. Courts are “institutionally ill-equipped ‘to assess the nature of battlefield decisions.’”¹⁸¹ In the words of former Defense Department General Counsel, Jeh Johnson,

Judges are accustomed to making legal determinations based on a defined, settled set of facts—a picture that has already been paint-

Security Screening (Oct. 8, 2002), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=10420>.

177. Martin Kaste, *Trial of Polygraph Critic Renews Debate Over Test’s Accuracy*, NAT’L PUB. RADIO (Jan. 2, 2015), <http://www.npr.org/2015/01/02/371925732/trial-of-polygraph-critic-renews-debate-over-tests-accuracy>.

178. Jeff Stein, *Lie Detectors Lie (Tell the C.I.A.)*, N.Y. TIMES (Feb. 19, 1995), <http://www.nytimes.com/1995/02/19/opinion/lie-detectors-lie-tell-the-cia.html>.

179. *Industrial Security Program*, DEFENSE OFFICE OF HEARINGS AND APPEALS, <http://www.dod.mil/dodgc/doha> (last visited Apr. 5, 2017).

180. See, e.g., *Ranger v. Tenet*, 274 F. Supp. 2d 1, 4 (D.D.C. 2003) (“Mr. Ranger appealed the denial of his security clearance through the administrative process offered by the CIA. He was denied the opportunity to appear in person before an adjudicative authority; however, he did eventually meet with Mr. Tenet, who was the CIA’s Acting Director at the time. Mr. Tenet promised to ‘follow [Mr.] Ranger’s appeals process to closure.’”).

181. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973)).

ed; not a moving target, which is what we are literally talking about here. These are not one-time-only judgments and *we want* military and national security officials to continually assess and reassess these two questions up until the last minute before an operation. If these types of continual reassessments must be submitted to a member of the Article III branch of government for evaluation, I believe we compromise our government's ability to conduct these operations effectively. The costs will outweigh the benefits.¹⁸²

However, courts in security clearance cases are not deciding upon a moving target—most security clearance cases would involve issues of discrimination or retaliation that judges are completely qualified to make.

Courts make many complex decisions outside the realm of any judge's personal expertise every day. Courts often have to make decisions that involve complex scientific evidence. A trial judge, acting as gatekeeper, must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."¹⁸³ As Justice Breyer noted in his concurrence in *Joiner*, judges will sometimes have to make "subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer."¹⁸⁴ However, despite the difficulty, judges must make these decisions even though "judges are not scientists and do not have the scientific training that can facilitate the making of such decisions."¹⁸⁵ As Judge Kaplan has pointed out, "criminal cases arising out of alleged terrorist activity can be tried quite readily in Article III courts. We have been doing it for over twenty years."¹⁸⁶

As for the fact that classified information *may* play a role in a given case, "Article III judges can receive highly sensitive classified information *ex parte*; in Washington, D.C., the infrastructure for doing this already exists."¹⁸⁷ There are also already mechanisms in place for attorneys to receive clearances if that is deemed necessary in a case. And the judiciary is "one of the more

182. Jeh Johnson, Keynote Address at the Center on National Security at Fordham Law School: A "Drone Court": Some Pros and Cons (Mar. 18, 2013), <https://www.lawfareblog.com/jeh-johnson-speech-drone-court-some-pros-and-cons>.

183. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

184. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring).

185. *Id.* at 148.

186. Lewis A. Kaplan, *The Implications of Trying National Security Cases in Article III Courts*, 8 J. NAT'L SECURITY L. & POL'Y 337, 338 (2016).

187. Johnson, *supra* note 182.

leak-resistant of government institutions.”¹⁸⁸ Another possibility, advocated by a number of scholars is the possibility of centralizing judicial review of terrorist detention hearings in one court, possibly the D.C. District Court.¹⁸⁹ Therefore, the court would acquire any additional expertise needed in security and intelligence matters over time.¹⁹⁰

Judicial review is necessary in security clearance decisions. Just as other scholars have argued that the Supreme Court should reevaluate its deferential stance in national security cases more generally,¹⁹¹ it is especially true in the security clearance process where there are easy solutions to any national security concerns.

Scholars have noticed a similar tension in other areas of national security law. The Second Circuit in *MacWade v. Kelly* looked at the constitutionality of the NYPD subway search program where the NYPD set up checkpoints and varied their location, staffing, and timing in an effort to “deter terrorists from carrying concealed explosives onto the subway system and, to a lesser extent, to uncover any such attempt.”¹⁹² However, the court stated that it was not conducting a “searching examination of effectiveness” because the “decision is best left to those with ‘a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.’”¹⁹³ Professor Rascoff pointed out “the court [in *MacWade*] rejected the plaintiffs’ contention that assessment of constitutionality necessitates a measurement of the program’s deterrent effect. Thus, reviewing

188. Philip D. Reed Lecture Series, Panel Discussion, *The State Secrets Privilege and Access to Justice: What is the Proper Balance?*, 80 FORDHAM L. REV. 1, 9 (2011).

189. Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3, 56 (2009).

190. *Id.*

191. See, e.g., Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 945 (2012) (“At the end of the day, it is quite plausible to think the ordinary process of litigation, informed by the government and its adversaries, is more likely to yield a correct answer to legal questions than the abbreviating punctuation of a structural constitutional presumption.”); David Rudenstine, *Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37, 96 (2014) (“Perhaps in time individual justices on the Supreme Court will reconsider the Court’s deferential disposition in national security cases, and write opinions that chart a new course—a course in which the Court functions as a third co-equal and independent branch of government that provides meaningful judicial review of Executive policies and conduct, even in cases implicating national security.”).

192. *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006).

193. *Id.* at 273 (quoting *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454 (1990)).

courts essentially cede the task of assessing efficacy to the very officials who design and operate the challenged programs.”¹⁹⁴

Professor Sinnar examined the so-called rule of law tropes where the Executive Branch publicizes the fact that it is operating under the law, but because there is no review of its decisions there is no way to actually know whether it is.¹⁹⁵

In seeking to insulate national security conduct from external review, executive officials often publicize self-imposed rules that appear to subject their authority to familiar, well-established legal standards from constitutional or international law. But executive officials sometimes invoke such standards in public while deviating from prevalent interpretations of those constraints in secret. The effect is to mislead courts, policymakers, and the public about the extent to which national security actions threaten individual rights and democratic values.¹⁹⁶

The security clearance process is another area where the Executive Branch insists they are operating according to law, but it is completely internally regulated so it is immune from any type of substantive review. The CIA’s website states, “[t]he clearance process . . . is strictly governed by rules and regulations derived from Federal statute and executive orders.”¹⁹⁷ The process may be strictly governed, but it is in the dark, with their own internal policies.

It is fundamental to our society that an individual should have access to court when wronged, especially something that is so incredibly important that it affects the individual’s ability to work.¹⁹⁸ Once denied a security clearance, not only does an individual lose their current position, but it makes it almost impossible to acquire any job that also requires a security clearance.¹⁹⁹ Furthermore, many of the jobs in intelligence require skills that are not easily transferable to the private sector. After years of be-

194. Samuel Rascoff, *Counterterrorism and the New Deterrence*, 89 N.Y.U. L. REV. 830, 866 (2014).

195. Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1566 (2016).

196. *Id.*

197. *Consent Agreement*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/ehl/consentAction.do> (last visited Apr. 5, 2017).

198. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); Rudenstine, *supra* note 191, at 77.

199. See *Safeguard Your Security Clearance*, MILITARY.COM, <http://www.military.com/veteran-jobs/security-clearance-jobs/protect-your-security-clearance.htm> (last visited Apr. 5, 2017).

ing a spy, exactly what job are you qualified for? In a system in which security clearances can be revoked for arguably unjustifiable or misguided reasons, will agencies critical to our nation's security truly be able to attract the best and brightest? Consider the example of Adam Ciralsky, a CIA staff attorney whose security clearance was revoked and employment was terminated after two failed polygraph examinations related to his previous employment.²⁰⁰ Whether the CIA based its decision to terminate Ciralsky's employment on his alleged lack of candor or, as Ciralsky suggested, discrimination, Ciralsky—an apparently talented potential employee of the CIA, instead pursued another, albeit successful career path in the private sector.²⁰¹

Once reformed, the security clearance process should be uniform. In an age in which lone wolf and ISIS-inspired terrorists pose a deadly potential threat to America, local authorities are playing an even greater role than ever in preventing terrorism.²⁰² As a result, authorities such as the FBI, CIA, and local police must be able to effectively work together. If the security clearance process becomes uniform, then hopefully at least one part of the information-sharing problem will be solved.

The Supreme Court has shown in *Boumediene v. Bush* that it can give deference to the Executive Branch, without giving absolute deference. The Court starts by acknowledging that the Executive Branch needs to be able to respond quickly to threats that may arise:

Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.²⁰³

The Court then states, “[o]ur opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed

200. See, e.g., Vernon Loeb, *CIA Says ‘Lack of Candor’ Led to Firing*, WASH. POST, Feb. 6, 2010, at A10.

201. See, e.g., ‘*Nightly News*’ Wins 2 Emmy Awards, NBC NEWS (Nov. 1, 2007, 10:27 AM), http://www.nbcnews.com/id/21577507/ns/nbc_nightly_news_with_brian_williams/t/nightly-news-wins-emmy-awards/#.WJt9U7YrJ-V.

202. See PETER BERGEN, *THE UNITED STATES OF JIHAD* 57 (2016).

203. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

by the Judicial Branch.”²⁰⁴ In holding that prisoners in Guantanamo are entitled to the fundamental procedural protection of habeas corpus, the Court stated, “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”²⁰⁵

Fear tactics, such as Scalia’s assertion in his *Boumediene* dissent that the judgment of his colleagues would “cause more Americans to be killed,”²⁰⁶ do not make us safer. Absolute deference to the executive can actually have the opposite effect.

The definition of a security clearance is whether a person has access to classified information, up to the authorized clearance level. Even then, individuals with a security clearance should only have access to information they have the “need to know.”²⁰⁷ Obtaining a security clearance is a prerequisite for employment with the CIA; however, the CIA considers the “whole person” and recognizes that “no one is perfect”:

The Agency recognizes no one is perfect. Agency security officials consider the nature, extent, seriousness, and recency of past behavior. They weigh the potential risk and benefit of each individual—the whole person—with utmost care. Although national security is always the paramount consideration, our security experts work hard to ensure the Agency does not turn away unnecessarily someone who could make important contributions to the nation’s intelligence effort.²⁰⁸

Although agency discretion in granting security clearances is necessary to ensure that intelligence agencies get qualified candidates, it is worrisome because there is no judicial review or oversight of these decisions.

204. *Id.*; see Rick Pildes, *Does Judicial Review of National-Security Policies Constrain or Enable the Government?*, LAWFARE (Aug. 5, 2013, 1:48 PM), <http://www.lawfareblog.com/2013/08/does-judicial-review-of-national-security-policies-constrain-or-enable-the-government/> (“Those resistant to judicial review, including the government, can too easily lose sight of this power of courts to legitimate government action.”).

205. *Boumediene*, 553 U.S. at 798.

206. *Id.* at 828 (Scalia, J., dissenting).

207. *Security Clearance FAQs*, U.S. DEPT OF STATE, <http://www.state.gov/m/ds/clearances/c10977.htm#5> (last visited Apr. 5, 2017) (“A clearance allows a person filling a specific position to have access to classified national security information up to and including the level of clearance that they hold, so long as the person has a need to know the information.”); see Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (discussing the classification of national security information).

208. *Application Process*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process> (last visited Apr. 5, 2017).

At the very least, cases involving fundamental rights under the Constitution or Title VII should be subject to judicial review. As the Fourth Circuit stated in *United States v. Marchetti*, “[s]ince First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees.”²⁰⁹ Judicial review of security clearance denial and revocation cases will increase transparency and strengthen the security clearance process.

CONCLUSION

The security clearance process may never be perfect. It is impossible to decide with 100 percent certainty who represents a security threat and who does not. The highly discretionary process may lead to inconsistencies in situations where one person may think a cleared individual is a whistleblower, but another person thinks the cleared individual is a grave security threat who leaked important classified information. However, the security clearance process is most individuals’ first contact with the agency for whom they are going to work. The current shadowy system, in which an individual may wait years for a top secret security clearance with the CIA, is untenable, especially because many individuals who wait the longest or are ultimately denied a clearance are those we need most—candidates who have lived overseas, with critical language abilities, and extensive foreign contacts.²¹⁰ The CIA is trying to attract the best and the brightest candidates, and although some committed individuals will stay the course, others will either pursue other employment, or will begin employment with severe misgivings about their employer and the hiring process. When someone is denied a security clearance, or their clearance is revoked, they are then unable to challenge the denial or revocation on the merits in a court of law. Some may not even be completely aware of the reason their secu-

209. *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972).

210. See, e.g., *CIA Values Language Capabilities Among Employees*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/cia-values-language-capabilities.html> (last updated Apr. 30, 2013).

rity clearance was denied or revoked. When an individual believes their security clearance has been revoked for retaliation or discriminatory purposes, they should be able to challenge that decision in court.. These decisions are unlike wartime decisions that need to be made as events unfold. Article III courts are completely competent to make security clearance review decisions brought under the Constitution or Title VII.